

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, James E. Lewis (Lewis), appeals the post-conviction court's denial of his Petition for Post-Conviction Relief.

We affirm.

ISSUES

Lewis raises two issues on appeal, which we restate as the following three issues:

- (1) Whether he received effective assistance of trial counsel;
- (2) Whether he received effective assistance of appellate counsel; and
- (3) Whether his sentence was appropriate.

FACTS AND PROCEDURAL HISTORY

We adopt this court's statement of facts as set forth in our memorandum opinion of *Lewis v. State*, 49A02-9001-CR-68, slip op. at 2-3 (Ind. Ct. App. July 31, 1991).

In the early morning hours of December 20, 1988, Michael Anthony went to his front porch to investigate a banging noise. Anthony observed two men banging their shoulders against the door of a neighboring residence until the door opened. The two men then entered the residence. Anthony yelled to his mother to call the police. Still on his porch, Anthony observed the two men enter the kitchen of the neighboring house and then leave the house with two white bags over their shoulders which they did not carry into the residence. Anthony followed the two men until they entered a car parked a short distance away. By this time a police officer picked up Anthony and listened to Anthony's recitation of the events he had observed. The officer accompanied Anthony to the parked car where Anthony identified the car and identified Lewis as one of the men he observed break and enter, then leave, the neighboring house. A white pillow case on the rear seat of the car contained food items, an alcoholic beverage, and several bottles of hand lotion. The resident of the burglarized premises, . . . , was in the hospital at the time of the burglary.

On or about December 20, 1988, the State filed an Information charging Lewis with Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1 and Count II, theft, a Class D felony, I.C. § 35-43-4-2. Additionally, the State alleged Lewis to be an habitual offender. On September 14, 1989, a jury found Lewis guilty as charged. Lewis appealed, raising four issues for review: (1) whether the trial court erred in denying Lewis' motion for mistrial; (2) whether the evidence is sufficient to sustain Lewis' convictions; (3) whether the trial court abused its discretion in admitting evidence; and (4) whether Lewis received effective assistance of trial counsel. On July 1991, we affirmed Lewis' conviction.

On November 9, 1992, Lewis filed a petition for post-conviction relief, which was withdrawn on March 21, 2001. Thereafter, on January 27, 2006, Lewis filed another petition for post-conviction relief. After the State filed its answer, the post-conviction court held a hearing on July 27, 2006. On July 17, 2007, the post-conviction court issued its Findings of Fact and Conclusions of Law denying Lewis' petition.

Lewis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1 § 5. To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to that

reached by the post-conviction court. *Strowmatt v. State*, 779 N.E.2d 971, 975 (Ind. Ct. App. 2002).

II. *Effective Assistance of Trial Counsel*

First, Lewis contends that his trial counsel was ineffective during the sentencing phase of his trial. However, Lewis already raised a claim of ineffective assistance of trial counsel on direct appeal where his argument failed. *See slip op.* p. 6. It has long been the rule that a defendant who raises a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from subsequently relitigating that claim. *See Sawyer v. State*, 679 N.E.2d 1328, 1329 (Ind. 1997) (“[The defendant], having once litigated his Sixth Amendment claim concerning ineffective assistance of counsel, is not entitled to litigate it again, by alleging different grounds.”). Thus, Lewis’ argument of ineffective assistance of trial counsel is barred by *res judicata*.

III. *Effective Assistance of Appellate Counsel*

Next, Lewis asserts that the assistance of his appellate counsel was ineffective. Specifically, Lewis argues that his appellate counsel failed to address certain sentencing issues on direct appeal. Ineffective assistance of counsel claims are governed by a two-part test outlined by the United State Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). According to this test, Lewis must first establish that his counsel’s performance was deficient. *Id.* This requires a showing that his counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of Lewis’ Sixth Amendment right to counsel. *Id.*

Second, Lewis must demonstrate that the deficient performance prejudiced his defense. *Id.* In order to establish prejudice, Lewis must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Our supreme court has recognized that a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001).

Ineffective assistance claims at the appellate level of proceedings generally fall into three categories: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *reh'g denied, cert. denied*, 525 U.S. 1021 (1998). Lewis' claim of appellate counsel's ineffectiveness is based on the second category.

We have stated before that the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, and appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. *See Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). Our supreme court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Bieghler*, 690 N.E.2d at 194. If this analysis demonstrates deficient performance by counsel, the court then examines

whether the issues that appellate counsel failed to raise “would have been clearly more likely to result in reversal or an order for a new trial.” *Id.*

In his appellate brief, Lewis’ argument with regard to ineffective assistance by his appellate counsel amounts to a half-page. Even though Lewis sets out the standard by which to measure his counsel’s effectiveness, he fails to support his claim with cogent reasoning by focusing on the facts of his specific situation. As such, we conclude that Lewis waived his argument for our review. *See* Ind. Appellate Rule 46(A)(8).

IV. Appropriateness of Sentence

Lastly, Lewis raises the claim that the trial court erred by not properly weighing the aggravating and mitigating circumstances during sentencing. The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). A post-conviction petition is not a substitute for an appeal, and post-conviction proceedings do not afford a petitioner a super appeal. *Id.* If an issue was known and available but not raised on direct appeal, it is waived. *Id.* Lewis’ perceived sentencing error was available at the time

he filed his direct appeal, yet Lewis failed to raise the issue. Therefore, we conclude that Lewis' claim is waived for our review.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly denied Lewis' Petition for Post-Conviction Relief.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.